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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

TRISHA WREN and CYNTHIA PIPER,  
et al., individually and on behalf of others  
similarly situated,

Plaintiffs,

vs.

RGIS Inventory Specialists, LLC, RGIS,  
LLC, and Does 1-25 Inclusive,

Defendants.

Case Nos. 3:06-cv-05778 JCS; 3:07-cv-00032 JCS

**CLASS AND COLLECTIVE ACTION**

**PLAINTIFFS' REPLY MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO FACILITATE NOTICE**

Date: December 14, 2007

Time: 9:30 a.m.

Place: Courtroom A, 15<sup>th</sup> Floor

The Honorable Magistrate Judge Spero

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1 **I. INTRODUCTION**

2 Defendant's opposition misstates Plaintiffs' claims and erroneously contends that Plaintiffs  
 3 are not challenging any of the written policies and procedures of RGIS. Because Plaintiffs rely  
 4 upon Defendant's written policies and procedures to support conditional certification, in addition  
 5 to the evidence contained in Plaintiffs' declarations regarding off-the-clock work, Defendant's  
 6 reliance on alleged variations in the declaration testimony is insufficient to defeat conditional  
 7 certification. As discussed below, Plaintiffs' claims are based on defects that appear on the face of  
 8 RGIS' uniform written policies and procedures. It is undisputed that these policies and procedures  
 9 apply to all auditors throughout the United States, and that RGIS has a centralized payroll system  
 10 operated from corporate headquarters. Plaintiffs' evidence shows that RGIS has failed to adopt  
 11 and enforce policies and procedures that are sufficient to ensure that RGIS auditors do not perform  
 12 unpaid off-the-clock work in violation of the Fair Labor Standards Act ("FLSA") and its  
 13 accompanying regulations.

14 Defendant's argument that this Court should skip straight to the more stringent "second  
 15 stage" review traditionally applied at the decertification stage, and that it should not apply the more  
 16 lenient standard that has been used by the overwhelming majority of courts at the notice stage of  
 17 an FLSA collective action, is wrong on the law. There are no special circumstances that would  
 18 warrant a departure from applying the "first stage" standard in this case. As discussed below,  
 19 Defendant has grossly exaggerated the scope of discovery that has been completed. To date,  
 20 Plaintiffs have taken eight depositions, and Defendant has taken five—very modest numbers for a  
 21 multi-party case, let alone a putative national class action. Neither side has propounded any  
 22 interrogatories, nor has there been any expert discovery regarding Defendant's payroll and  
 23 timekeeping records. In fact, Defendant has stonewalled the majority of discovery that Plaintiffs  
 24 have attempted to undertake in this case, including any discovery regarding documents relating to  
 25 Plaintiffs' overtime claims. *See* Reply Declaration of Guy Wallace ("Wallace Reply Decl.") ¶¶8-  
 26 11. Similarly, to the extent that Defendant relies upon discovery that was conducted previously in  
 27 the *Johnson* or *Davidson* cases, a review of the record shows that discovery in those cases did not  
 28 extend beyond the two Texas districts at issue. Wallace Reply Decl. ¶¶21-24. Finally, the only

1 courts in this District to consider such proposals to proceed directly to the “second stage” review in  
 2 cases involving a similar level of discovery to that completed in this case have rejected them. *See*  
 3 discussion *infra* at II.A.

4 Numerous courts have granted conditional certification of cases involving off-the-clock  
 5 violations, including cases dealing with the types of donning time and waiting time claims raised  
 6 herein.<sup>1</sup> Plaintiffs have submitted far more evidence in support of conditional certification than is  
 7 usually required at the notice stage. Many courts have granted conditional certification based  
 8 solely upon the allegations of the complaint and a small number of declarations.

9 Moreover, it is clear that conditional certification is the best approach to managing this case.  
 10 As of the date of this filing, there are 540 opt-ins to this case.<sup>2</sup> Over 280 of these opt-ins are from  
 11 California employees of RGIS. Wallace Reply Decl. ¶3. As discussed, Plaintiffs challenge the  
 12 legality of written policies and procedures. It will be possible to determine whether Defendant has  
 13 violated the FLSA by conducting a statistical analysis of payroll and timekeeping records. *See*  
 14 discussions *infra* at IV.C. If this case is certified, it is well settled that this Court will not have to  
 15 hear testimony from more than a representative sample of employees. Defendant’s alternative  
 16 approach—that this Court only permit individual joinder of California employees to create a  
 17 massive multi-party case—would be totally unworkable as a practical matter, and unnecessary  
 18 given that the claims herein can be adjudicated on a class-wide basis.

19 Defendant argues that Plaintiffs’ declarations show wide variations in claims and factual  
 20 circumstances that preclude certification. In this regard, it is significant that Defendant has not and  
 21 cannot make any serious contention that its auditors do not perform identical job duties throughout  
 22 the United States. In essence, all they do is count inventory. This fact alone weighs heavily in  
 23 favor of conditional certification because it is well settled that employees need not be identically

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24  
 25 <sup>1</sup> Based upon the evidence to date, which has evolved since the filing of Plaintiffs’ opening papers on  
 26 conditional certification, Plaintiffs do not seek Court approval to proceed on a class basis for claims  
 regarding doffing time, post-inventory waiting time, or time spent loading or unloading vehicles.

27 <sup>2</sup> Several courts have held that a high number of opt-ins supports the grant of conditional certification. *See,*  
 28 *e.g., Jackson v. City of San Antonio*, 220 F.R.D. 55, 62-63 (W.D. Tex. 2003).

1 situated, but that they need only be similarly situated.<sup>3</sup> Moreover, the type of “variation” that  
 2 Defendant points to largely consists of minor differences, such as the fact that one declarant  
 3 testifies to spending 15 minutes of unpaid time waiting, while another spends 30 minutes waiting.  
 4 Under applicable precedents, these are not the types of differences that make a difference. As  
 5 discussed in the accompanying Reply Declaration of Andrew Lee (“Lee Reply Decl.”), which cites  
 6 applicable evidence in the declaration testimony, all of Plaintiffs’ declarants testify to working a  
 7 significant amount of unpaid off-the-clock time. Given Defendant’s uniform written policies, and  
 8 given the fact that auditors have the same job duties, Plaintiffs’ evidence is more than sufficient to  
 9 show that the auditors are “similarly situated.”

10 Determined to avoid conditional certification at any cost, Defendant’s counsel have  
 11 submitted the declarations of 131 “happy campers,” of whom 85 have worked as auditors. (*See*  
 12 *Sunshine Reply Declaration*, ¶4). Defendant’s boilerplate declarations amply demonstrate why  
 13 courts have been chary of declarations solicited from low-level employees by their employer.  
 14 None of the declarants who appeared for deposition had any understanding of the claims in this  
 15 case. (*See Park Reply Declaration* which provides a summary and analysis of the testimony from  
 16 Defendant’s employee declarants.) Worse, Defendant has admitted that most of these declarants  
 17 were paid for the time spent in the preparation of this testimony. Seven declarants out of the  
 18 sample of twenty that were made available for discovery either withdrew their declarations, opted-  
 19 in to the case, modified their prior declaration testimony in favor of Plaintiffs in significant  
 20 respects, or did not even appear for deposition. Finally, to the extent that Defendant has proffered  
 21 these declarations as proof that it should win this case on the merits, such considerations are  
 22 premature and improper during the current proceedings anyway.

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23  
 24 <sup>3</sup> *See, e.g., Delgado v. Ortho-McNeil, Inc.*, No. SACV07-263, 2007 WL 2847238, at \*2 (C.D. Cal. Aug.  
 25 7, 2007) (“Here, the allegations of the complaint and the evidence submitted by both Plaintiffs and  
 26 Defendants establish that the job duties of sales representatives are sufficiently similar to warrant  
 27 conditional certification at the notice stage.”); *Gerlach v. Wells Fargo & Co.*, No. C 05-0585, 2006 WL  
 28 824652, at \*3 (N.D. Cal. Mar. 28, 2006) (“As noted above, the standard for certification at the notice stage  
 is a lenient one. Plaintiffs meet their burden of showing that all BSEs are similarly situated with respect to  
 their FLSA claim: all BSEs share a job description, were uniformly classified as exempt from overtime pay  
 by Defendants and perform similar job duties.”).

1 In summary, Plaintiffs have satisfied the “lenient” standard for conditional certification.  
 2 Other auditor employees should be given the opportunity to receive notice and choose whether  
 3 they wish to opt in. At the close of discovery, RGIS will get its opportunity to move for  
 4 decertification, in accordance with the traditional approach. With the benefit of complete  
 5 discovery, this Court can then determine the best approach to adjudicating this case.

6 II. UNDER APPLICABLE PRECEDENTS THIS COURT SHOULD APPLY THE MORE  
 7 LENIENT “STAGE ONE” STANDARD OF REVIEW

8 A. The “Stage One” Standard Of Review Applies Until The Close Of Discovery

9 In their opposition brief, Defendant contends that this Court should not apply the more  
 10 lenient first stage standard of review in evaluating Plaintiffs’ Motion to Facilitate Notice because  
 11 the parties have conducted a limited amount of discovery in this case, and because some discovery  
 12 was conducted in the *Johnson v. RGIS* case regarding a single Texas district, District 166.

13 The overwhelming majority of courts have held the more lenient stage one standard applies  
 14 until *the close of discovery*, at which point the defendant may make a motion to decertify. After  
 15 the close of discovery, the more rigorous “stage two” standard of review is applied. As this Court  
 16 correctly explained in its Order Denying Motion For An Order Declaring “Opt-Ins” Invalid:

17 District courts in the Ninth Circuit have generally applied an “ad hoc two tiered approach”  
 18 in determining whether the plaintiffs are similarly situated. Under this approach, the district  
 19 court makes two determinations. First, the court determines whether a collective action  
 20 should be certified for the purpose of sending notice to potential class members (“the notice  
 21 stage”). At this stage, the standard is lenient, requiring “little more than substantial  
 22 allegations, supported by declarations or discovery, that ‘the putative class members were  
 23 together victims of a single decision, policy, or plan. Second, after discovery has concluded,  
 24 the court revisits the question of whether the class meets the “similarly situated”  
 25 requirement, this time applying a stricter standard.

26 *Piper v. RGIS Inventory Specialists, Inc.*, No. C-07-00032, 2007 WL 1690887, at \*4 (N.D. Cal.  
 27 June 11, 2007).

28 The vast majority of courts have reached the same conclusion. To Plaintiffs’ knowledge,  
 there is no published decision from within this district in which a court applies the stage two

1 standard prior to the close of discovery.<sup>4</sup> Numerous other district courts within the Ninth Circuit  
 2 have reached the same conclusion.<sup>5</sup> Moreover, the only Circuit Courts that have addressed the  
 3 parties' burdens at each of the two stages of the conditional certification process under the FLSA  
 4 have held that the second stage review takes place after the completion of discovery.<sup>6</sup> In fact,  
 5 district courts throughout the nation have specifically held that the second stage review of the  
 6 propriety of an FLSA collective action takes place *after* the completion of discovery when the  
 7 defendant files a motion for decertification.<sup>7</sup>

8  
 9 <sup>4</sup> See, e.g., *Adams v. Inter-Con Sec. Sys. Inc.*, 242 F.R.D. 530, 536 (N.D. Cal. 2007) ("In the second step,  
 10 the party opposing the certification may move to decertify the class once discovery is complete and the case  
 11 is ready to be tried."); *Stanfield v. First NLC Fin. Servs.*, No. C 06-3892, 2006 WL 3190527, at \*2 (N.D.  
 12 Cal. Nov. 1, 2006) ("Courts in this district have used a two-tiered approach: the court makes an initial  
 13 determination of whether the plaintiffs are similarly situated based on the pleadings and any affidavits  
 14 submitted by the parties. The standard is lenient, and conditional collective action certification is usually  
 15 granted. The second step occurs when discovery is complete.") (citations omitted); *Gerlach v. Wells Fargo*  
 16 & Co., No. C 05-0585, 2006 WL 824652, at \*3 (N.D. Cal. March 28, 2006) ("This Court, too, will  
 17 conditionally certify the collective action for the purpose of sending notice of the action to potentially  
 18 similarly situated employees. After discovery is complete, Defendants can move for decertification, and the  
 19 Court will then apply the heightened second-tier review."); *Leuthold v. Destination America*, 224 F.R.D.  
 20 462, 467 (N.D. Cal. 2004) ("Because the court generally has a limited amount of evidence before it, the  
 21 initial determination is usually made under a fairly lenient standard and typically results in conditional class  
 22 certification. Once discovery is complete and the case is ready to be tried, the party opposing class  
 23 certification may move to decertify the class.") (citations omitted).

24 <sup>5</sup> See, e.g., *Morden v. T-Mobile USA*, No. C05-2112RSM, 2006 WL 2620320, at \*4 (W.D. Wash. Sept. 12,  
 25 2006) (rejecting defendant's proposal to proceed to second stage review because some discovery had been  
 26 completed as "contrary to the broad remedial policies underlying the FLSA" and holding "After discovery  
 27 is complete, defendant may move for decertification, and the Court will then apply the heightened second-  
 28 tier review."); *Avila v. Turlock Irrigation Dist.*, No. 1:06-CV-00050, 2006 WL 3201083, at \*3 (E.D. Cal.  
 Nov. 6, 2006) ("Due to the minimal evidence at the court's disposal, this determination is based on a fairly  
 lenient standard, and typically results in a 'conditional certification' of a representative class. The second  
 determination is made after discovery is largely complete, usually on a motion for decertification by  
 defendant.") (citations omitted); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 482 (E.D. Cal.  
 2006) ("The second tier of analysis occurs once discovery is complete and the case is ready to be tried,  
 generally triggered by defendant's motion to decertify the class.") (citations omitted).

<sup>6</sup> See, e.g., *Thiessen v. Gen. Elec. Capital Co.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001) ("At the conclusion  
 of discovery (often prompted by a motion to decertify), the court then makes a second determination,  
 utilizing a stricter standard of 'similarly situated'."); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th  
 Cir. 1995) ("The second determination is typically precipitated by a motion for 'decertification' by the  
 defendant after discovery is largely complete and the matter is ready for trial.").

<sup>7</sup> See, e.g., *Dege v. Hutchinson Tech., Inc.*, Civ. No. 06-3754, 2007 WL 586787, at \*1 (D.Minn. Feb. 22,  
 2007) ("At this stage, the plaintiffs need only establish a colorable basis for their claim that the putative  
 class members were the victims of a single decision, policy, or plan. In the second stage, which occurs after

1 The only published decisions in the Northern District to address similar proposals to proceed  
 2 directly to stage-two review have rejected this unorthodox approach for sound reasons. For  
 3 example, Judge Wilken addressed a similar situation in *Gerlach v. Wells Fargo*. In that case, the  
 4 parties had taken over 16 depositions, and the Defendant had produced more than 40,000 pages of  
 5 documents. This is far more discovery than has been completed to date in the case at bar. Wallace  
 6 Reply Decl. ¶¶10, 26. Defendant Wells Fargo argued that because a substantial amount of  
 7 discovery had already been completed, the court should apply the second stage standard of review.  
 8 Judge Wilken rejected defendants' argument, holding:

9 Defendants argue that this motion should be decided under the stricter second stage  
 10 analysis. According to Defendants, extensive discovery has been conducted: Plaintiffs  
 11 have received over 40,000 pages of discovery in response to 116 requests and have  
 12 deposed sixteen witnesses. Defendants contend that the evidence shows that [the  
 13 employees] are not similarly situated: they are more than 2,500 white-collar  
 14 employees who work in widely varying jobs in thirty-eight States and in multiple lines  
 15 of businesses...Defendants cite *Pfohl v. Farmers Ins. Group*, 2004 WL 554834, \*3  
 16 (C.D. Cal. Mar. 1, 2004), to support their argument that the Court can, and should,  
 17 proceed to the second stage of the two-tiered analysis. In *Pfohl*, the court proceeded  
 18 directly to the second stage and weighed relevant factors to determine whether the  
 19 plaintiffs there were similarly situated. But, before proceeding to the second stage, the  
 20 court noted that "the parties did not dispute that discovery has been undertaken  
 21 relating to the issues of certification of this action as a collective action." [citation  
 22 omitted] Here, although volumes of paper have been produced and over a dozen  
 23 witnesses deposed, Plaintiffs state that discovery is nowhere near complete. After

24 discovery is completed, the court conducts an inquiry into several factors, including the extent and  
 25 consequences of disparate factual and employment settings of the individual plaintiffs, the various  
 26 defenses available to the defendant that appear to be individual to each plaintiff, and other fairness  
 27 and procedural considerations."); *Sherrill v. Sutherland Global Servs., Inc.*, 487 F.Supp.2d 344, 349  
 28 (W.D.N.Y. 2007) ("The second step of a collective action inquiry occurs at the close of discovery."); *Austin*  
*v. CUNA Mut. Ins. Soc'y*, 232 F.R.D. 601, 605 (W.D. Wis. 2006) ("At the close of discovery, the defendant  
 may make a motion for decertification, at which point the court examines in detail the evidence and  
 arguments submitted by the parties on the question of similar situation."); *Clarke v. Convergys Customer*  
*Mgmt. Group, Inc.*, 370 F.Supp.2d 601, 604-05 (S.D. Tex. 2005) ("The second stage is typically  
 precipitated by a motion for 'decertification' by the defendant after discovery is largely complete.");  
*Pendlebury v. Starbucks Coffee Co.*, No. 04-CV-805212005, 2005 WL 84500, at \*3 (S.D. Fla. Jan. 3, 2005)  
 ("The second stage of the two-tiered procedure usually occurs at the end of discovery upon the defendant's  
 motion for decertification of the class. At the second stage, the court has much more information on which  
 to base its decision and makes a factual determination on the similarly situated question."); *Gjurovich v.*  
*Emmanuel's Marketplace Inc.*, 282 F.Supp.2d 101, 105 (S.D.N.Y. 2003) ("Again, the Plaintiff's burden for  
 proving that he is similarly situated to these potential plaintiffs is minimal for this preliminary  
 determination—a determination that can be modified or reversed after discovery is complete.").

1 filing their reply, Plaintiffs submitted additional relevant information, which  
 2 Defendants had only recently produced. Even Defendants do not contend that  
 3 discovery on the issue of certification is complete; Defendants only contend that  
 4 discovery has been extensive and that additional discovery will not change the facts or  
 5 analysis that [the employees] are not similarly situated.

6 To apply the second-tier heightened review at this stage would be contrary to the broad  
 7 remedial purposes underlying the FLSA... This Court, too, will conditionally certify the  
 8 collective action for the purpose of sending notice of the action to potentially similarly  
 9 situated employees. After discovery is complete, Defendants can move for  
 10 decertification, and the Court will then apply the heightened second-tier review.

11 No. C 05-0585, 2006 WL 824652, at \*3 (N.D. Cal. March 28, 2006).

12 Chief Judge Walker reached the same conclusion in *Leuthold v. Destination America*, 224  
 13 F.R.D. 462, 467-68 (N.D. Cal. 2004). In that case, Judge Walker rejected defendant's argument  
 14 that it was permissible to skip over the notice stage and proceed directly to the second stage  
 15 because extensive discovery had been completed. The court held, in pertinent part:

16 Although it is a close question, give that extensive discovery has already taken place, the  
 17 court agrees with plaintiffs that the court ought to begin the FLSA class certification  
 18 analysis with the question whether notice should be sent to the prospective class. Several  
 19 considerations support this conclusion. First, the discovery phase of his lawsuit, though  
 20 apparently drawing to a close, is still in something of a state of flux... Second, the two-  
 21 tier approach contemplates progression through the notice stage before reaching the more  
 22 rigorous inquiry required to maintain the class... As described above, it is unclear whether  
 23 the factual record of this case is complete. The relevant facts have not been presented  
 24 with clarity, and the court cannot be certain whether any of the ongoing discovery  
 25 disputes would inform the court's second tier analysis.

26 ...  
 27 Finally, beginning with the tier one analysis is the most equitable means of proceeding.  
 28 As noted above, should the court bypass tier one entirely, some potential plaintiffs might  
 not become aware of the lawsuit and would not have an opportunity to join the suit.  
 And should the court proceed to tier two on an unsettled factual record, the court might  
 be deprived of crucial facts that would support plaintiffs' arguments for class treatment.  
 The potential prejudice to plaintiffs of bypassing tier one thus is significant. On the  
 other hand, the consequences to defendants of beginning with tier one are not unduly  
 burdensome. Should the court conditionally certify the class, defendants will be free to  
 move for decertification once the factual record has been finalized and the time period  
 for opting in has expired.<sup>8</sup>

<sup>8</sup> Defendant cites four cases in which the court applied the stage two standard after the completion of  
 "substantial" discovery [*Brooks v. BellSouth Telecomm., Inc.*, 164 F.R.D. 561 (N.D. Ala. 1995); *Tyler v.*  
*Payless Shoe Source, Inc.*, 2:05-CV-33F, 2005 WL 3133763 (M.D. Ala. Nov. 23, 2005); *Basco v. Wal-Mart*  
*Stores, Inc.*, No. Civ.A. 00-3184, 2004 WL 1497709 (E.D. La. July 2, 2004); *Pfohl v. Farmers Ins. Group,*

**B. Relatively Little Discovery Has Taken Place In This Case, And Substantial Discovery Remains To Be Completed**

Plaintiffs have taken one and half days of Rule 30(b)(6) depositions on topics pertinent to this motion. Plaintiffs have also deposed seven of Defendant's employee declarants. Park Reply Decl. ¶10. Defendant has deposed only five of the named Plaintiffs. Wallace Reply Decl. ¶¶38-42. Plaintiffs have served three sets of Requests for Production of Documents. Defendant has stonewalled the bulk of Plaintiffs' requests, claiming that nationwide discovery is overbroad, and limiting its responses to the geographic areas pertaining to the named Plaintiffs—just as it did in the *Johnson* case. Wallace Reply Decl. ¶¶7, 22. Neither party has engaged in any expert discovery. Both the merits discovery and the expert discovery cut offs are still months away, even under the ambitious case schedule that has been adopted herein. This case has been on file for less than one year, and is in its initial stages.

Moreover, Defendant has also blocked Plaintiffs' discovery on numerous issues that are directly relevant to Plaintiffs' donning time, waiting time, travel time and overtime claims. For example, Defendant has refused to produce payroll and timekeeping records for any of its employees other than the named Plaintiffs. Wallace Reply Decl. ¶11. These records are relevant to determining the nature and extent of overtime worked by RGIS auditors. The payroll records of the named Plaintiffs, however, show that RGIS auditors do work overtime. Lee Reply Decl. ¶10. It is doubtful that Defendant would seriously dispute that its auditors work substantial amounts of overtime when the Company conducts quarterly inventories for its clients.

No. CV03-3080 DT, 2004 WL 554834 (C.D. Cal. March 1, 2004)]. None of those cases have any application to the instant case. For instance, in *Basco v. Wal-Mart Stores, Inc.*, the court applied the "stage two" standard where parties completed briefing on the motion to facilitate notice almost four years after the case was filed, plaintiffs had amended the complaint six times, and portions of the action had already been decided by the appellate court. In *Brooks*, an ADEA case, the court applied "second stage" review only after the plaintiff had deposed seven management employees and had access to "numerous discovery documents," including detailed information about pay grade, years of service, job description, geographic location, and the reasons for dismissal of the putative class members. Here, Plaintiffs have deposed only two RGIS management employees and have no payroll or timekeeping data for the putative class. *Tyler* fails to support Defendant's position because the *Tyler* court did not adopt the two-step approach used in this Circuit, and the amount of discovery conducted by the parties was unclear. Lastly, *Pfohl* does not support Defendant's position because discovery in this case is far from complete.

1 Given the size of the company at issue, the status of this case as a putative national class, the  
 2 complex and numerous issues raised in the Consolidated Complaint, and the limited discovery that  
 3 has been undertaken by both sides, Defendant's contention that substantial discovery has been  
 4 completed such that this Court is in a position to apply stage two review is insupportable.

### 5 **C. Conditional Certification Is Proper In An Off-The-Clock Case**

6 Courts across the county have routinely granted collective action status to off-the-clock  
 7 cases. Many of these have involved challenges to policies and payroll systems that failed to ensure  
 8 that employees were compensated for all hours worked as required by the FLSA. Recently, in  
 9 *Adams v. Inter-Con Security Systems*, 242 F.R.D. 530 (N.D. Cal. 2007), Judge Patel granted  
 10 conditional certification of a national class of security guards who contended that they had been  
 11 forced to do pre-shift work off-the-clock. Judge Patel held that conditional certification of the  
 12 plaintiffs' off-the-clock claims was appropriate because they challenged off-the-clock work  
 13 resulting from defects in an employer's written policies and procedures. *Id.* at 537. Numerous  
 14 other courts have concluded that donning and doffing cases, pre- and post-shift activity cases, and  
 15 other off-the-clock cases were suitable for collective action treatment.<sup>9</sup>

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17 <sup>9</sup> See e.g., *Dominquez v. Minnesota Beef Indus.*, Civ. No. 06-1002, 2007 WL 2422837, at \*3 (D. Minn. Aug.  
 18 21, 2007) (granting conditional certification of off-the-clock donning claim, and rejecting defendant's  
 19 argument that individual differences in the amount of time spent donning and doffing as irrelevant to  
 20 conditional certification); *Burch v. Qwest Communications Int'l, Inc.*, 500 F.Supp.2d 1181, 1190 (D.Minn.  
 21 2007) (granting conditional certification of nationwide class of employees challenging off-the-clock pre-  
 22 shift and post-shift work); *Sherrill v. Sutherland Global Servs., Inc.*, 487 F.Supp.2d 344, 349-50 (W.D.N.Y.  
 23 2007) (conditionally certifying off-the-clock FLSA class of telemarketers from various states who were  
 24 allegedly required to arrive early to sign into the computer and review e-mails before their official work  
 25 time started because affidavits described uniform policies at ten of eleven call centers and a company-wide  
 26 time system); *Wilks v. Pep Boys*, No. 3:02-0837, 2006 WL 2821700, at \* 5 (M.D. Tenn. Sept. 26, 2006)  
 27 (denying defendant's decertification motion of nationwide class in off-the-clock overtime case because  
 28 "Given the plaintiffs' proffer of significant evidence supporting their contention that the defendant, despite  
 its written policies, subjected them to impermissible time-keeping and overtime practices, the court finds  
 that the plaintiffs have demonstrated their subjection to a common, impermissible practice in a manner that  
 suffices to meet their burden at this decertification stage of the proceedings."); *Clarke v. Convergys  
 Customer Mgmt. Group*, 370 F.Supp.2d 601, 606 (S.D. Tex. 2005) ("Most importantly, all of the workers in  
 the potential class are alleged to have been subjected to the same unlawful practices (*i.e.*, the TKS policy)  
 and to have performed the same type of pre-and post-shift, off-the-clock tasks. Accordingly, the Court  
 finds that the class should be conditionally certified, that court approved notice is appropriate, and that the  
 discovery sought by Plaintiffs is appropriate."); *Frank v. Gold'n Plump Poultry, Inc.*, No. Civ. 041018,  
 2005 WL 2240336, at \*3 (D. Minn. Sept. 14, 2005) (granting conditional certification of off-the-clock

**D. Plaintiffs Have Proffered More Evidence In Support of Facilitating Notice Than Is Required Under Applicable Precedents To Meet The Stage One Standard**

It is well settled that the plaintiffs in an action pursuant to the FLSA are not required to proffer a great deal of evidence to meet the stage one standard of review. *See, e.g., Adams v. Inter-Con Security Systems, Inc.*, 242 F.R.D. 530, 536 (N.D. Cal. 2007) (“Courts have held that conditional certification requires only that “plaintiffs make substantial allegations that the putative class members were subject to a single illegal policy, plan or decision. Under this lenient standard, the plaintiffs must show that there is some factual basis beyond the mere averments in their complaint for the class allegations”) (citations and quotations omitted).<sup>10</sup>

Plaintiffs have more than met their burden. While the case law merely requires a “modest factual showing” that “the putative class members were together victims of a single decision,

claims re donning, and stating, “As Plaintiffs have indicated, even those employees who are paid according to their actual punch may, in fact, punch in after donning and punch out before doffing their equipment. Discovery will reveal whether this is the case. The Court concludes that Plaintiffs have satisfied their burden of demonstrating that they are similarly situated for purposes of conditional certification, notice and discovery.”); *Ballaris v. Wacker Silttronic Corp.*, No. 00-1627, 2001 WL 1335809, at \*\*1-3 (D. Or. Aug. 24, 2001) (granting motion to allow FLSA notice to all hourly employees assigned to work in clean rooms in Portland Oregon over three year period; detailed allegations of complaint, along with two affidavits, sufficient to meet the “less stringent” and “modest factual showing” standards); *Thiebes v. Wal-Mart Stores, Inc.*, No. 98-802, 1999 WL 1081357, at \*2 (D. Or. Dec. 1, 1999) (granting conditional certification of off-the-clock claims based on allegations in the complaint and two supporting declarations, and stating that Wal-Mart’s “policy prohibiting employees from working overtime, in conjunction with its policy of requiring employees to finish their job duties, creates an atmosphere in which working off the clock is essentially mandatory.”).

<sup>10</sup> *See also, Thiebes v. Wal-Mart Stores, Inc.*, No. 98-802, 1999 WL 1081357, at \*3 (certifying FLSA collective action based on allegations contained in the Amended Complaint and two affidavits); *Ballaris v. Whacker Silttronic Corp.*, No. 00-1627, 2001 WL 1335809, at \*3 (finding that two affidavits alone were sufficient to certify FLSA collective action); *Dietrich v. Liberty Square, LLC*, 230 F.R.D. 574, 577-78 (N.D. Iowa 2005) (notice granted based on allegations in two affidavits); *Neagley v. Atascosa County EMS*, No. Civ.A.SA04CA0893, 2005 WL 354085, at \*4 (W.D. Tex. 2005) (notice granted based on allegations in complaint alone.); *Reeves v. Alliant Techsys., Inc.*, 77 F. Supp.2d 242, 247 (D.R.I. 1999) (notice granted based solely on plaintiffs “alleging that the putative class members were together the victims of a single decision, policy or plan” without any opt-in forms); *Guzman v. Varco Int’l, Inc., et al.*, No. Civ.A. H-01-4000, 2002 WL 32639237, at \* 3 (S.D.Tex. 2002) (conditional notice granted based on allegations in complaint, three opt-in forms, and three affidavits); *Villatoro v. Kim Son Rest. L.P.*, 286 F.Supp.2d 807, 810-811 (conditional certification granted where plaintiff made the “minimal preliminary showing” necessary to an initial determination of similarly situated employees by plaintiff’s own testimony as to a common policy and practice, and plaintiff’s production of her own pay stubs).

1 policy, or plan,” Plaintiffs have identified and submitted specific written policies and procedures of  
 2 general application to all RGIS auditors. The Company’s Rule 30(b)(6) designee on the topic of  
 3 policies and procedures regarding compensation for auditors testified at deposition that the  
 4 Auditors Handbook-United States and the Field Policy Manual United States apply to all auditors  
 5 in the United States. *See* discussion *infra* at IV.A.

6 Plaintiffs have also submitted the declaration testimony of 13 named Plaintiffs and a total of  
 7 42 declarations in support of their claims that RGIS does not compensate its employees for hours  
 8 worked off-the-clock, including donning time, waiting time, pre-shift tasks and work-related travel  
 9 time. As discussed in the accompanying Reply Declaration of Andrew Lee, which cites supporting  
 10 evidence in the Declarations, all of Plaintiffs’ declarants have experienced non-payment of wages  
 11 in the areas of donning time, waiting time and travel time. Plaintiffs have submitted Declarations  
 12 from employees who worked in 47 districts in 20 states. In addition, 540 current and former  
 13 employees have opted-in to this case already. Further, 40 of Defendant’s employee declarants  
 14 testify to working off the clock. Sunshine Reply Decl. ¶13 (citing declarations). This substantial  
 15 body of evidence is more than sufficient to support conditional certification.

## 16 **II. PLAINTIFFS CHALLENGE RGIS’ UNIFORM WRITTEN POLICIES AND** 17 **PROCEDURES REGARDING COMPENSATING ITS AUDITORS**

### 18 **A. The FLSA And Its Accompanying Regulations Require That Employers Adopt and** 19 **Implement Policies and Procedures That Are Reasonably Calculated To Ensure** 20 **That Employees Are Paid For All Hours Worked**

21 It is well settled that the purpose of the FLSA is to ensure that employees are accurately paid  
 22 for all hours worked for the benefit of their employer. *See, e.g., Tennessee Coal, Iron & R. Co. v.*  
 23 *Muscoda Local*, 321 U.S. 590, 602 (1944); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 913  
 24 (9th Cir. 2004) (“One of the principal purposes of the FLSA is to ensure that employees are  
 25 provided appropriate compensation for *all* hours worked.”) (citing 29 C.F.R. § 778.223 (“Under  
 26 the Act an employee must be compensated for all hours worked.”)). It is equally well settled that  
 27 the FLSA is to be broadly construed to effectuate its remedial purposes. *Tennessee Coal, Iron &*  
 28 *R. Co.*, 321 U.S. at 597 (“But these provisions, like the other portions of the Fair Labor Standards

1 Act, are remedial and humanitarian in purpose ... Such a statute must not be interpreted or applied  
2 in a narrow, grudging manner.”).

3 The FLSA defines “employ” as “to suffer or permit to work.” 29 U.S.C. § 203(g). The  
4 FLSA’s regulations provide that “Work not requested but suffered or permitted is still work time.”  
5 29 C.F.R. § 785.11 (2007). To ensure that employees are paid for all time worked, the FLSA and  
6 its accompanying regulations impose a duty on employers to take all reasonable steps to ensure  
7 either that (a) off-the-clock work is prohibited and does not take place, or (b) that all hours actually  
8 worked get fully compensated as required by the FLSA. As the Eleventh Circuit held in *Reich v.*  
9 *Dept. of Conservation and Natural Resources, State of Alabama*:

10 The reason an employee continues to work beyond his shift is immaterial; if the employer  
11 knows or has reason to believe that the employee continues to work, the additional hours  
12 must be counted.

13 In all such cases it is the duty of the management to exercise its control and see that  
14 the work is not performed if it does not want it to be performed. It cannot sit back  
15 and accept the benefits without compensating for them. The mere promulgation of a  
16 rule against such work is not enough. Management has the power to enforce the rule  
17 and must make every effort to do so. 29 C.F.R. § 785.13.

18 This Court’s predecessor recognized that ‘an employer’s knowledge is measured in  
19 accordance with his duty ... to inquire into the conditions prevailing in his business. An  
20 employer does not rid himself of that duty because the extent of the business may preclude  
21 his personal supervision, and compel reliance on subordinates .... The cases must be rare  
22 where prohibited work can be done ... and knowledge or the consequences of knowledge  
23 avoided. In reviewing the extent of an employer’s awareness, a court need only inquire  
24 whether the *circumstances* ... were such that the employer either had knowledge [of  
25 overtime hours being worked] or else had ‘the opportunity through reasonable diligence to  
26 acquire knowledge. [citations and quotations omitted].

27 28 F.3d 1076, 1082 (11th Cir. 1994). Under applicable law, an employer violates the FLSA if it  
28 has, or should have, knowledge that off-the-clock work is being performed by its employees, and it  
29 fails to ensure that its employees are accurately paid for that off-the-clock work.<sup>11</sup> The Ninth

30 <sup>11</sup> See, e.g., *U.S. Dept. of Labor v. Cole Enters.*, 62 F.3d 775, 779-80 (6th Cir. 1995) (holding employer  
31 liable for failing to ensure that employees were accurately compensated for pre-shift and post-shift  
32 activities, and for failing to enforce its policy against off-the-clock work); *Lindow v. U.S.*, 738 F.2d 1057,  
33 1060-61 (9th Cir. 1984) (“[W]e have more recently held that ‘an employer who knows or should have  
34 known that an employee is or was working overtime’ is obligated to pay the overtime. [citation omitted] An

1 Circuit has repeatedly held that the FLSA regulations promulgated by the Department of Labor are  
 2 entitled to deference as to the meaning of the Act's requirements. *See, e.g., Webster v. Public*  
 3 *School Employees of Washington*, 247 F.3d 910, 914 (9th Cir. 2001) (citing cases).

4 **1) RGIS Has Long Been On Notice That Its Employees Were Not Being**  
 5 **Paid For All Hours Worked, But It Has Failed To Rectify The Problem**

6 There can be no reasonable dispute that RGIS has known that its employees perform  
 7 substantial amounts of off-the-clock work, including donning time, pre-inventory preparatory  
 8 activities, waiting time spent engaged to work, and work related travel time. As Defendant's  
 9 counsel point out in their opposition papers, RGIS has faced multiple suits for its off-the-clock  
 10 violations, as well as other violations of federal and state wage and hours laws. However,  
 11 Defendant's counsel has been quite misleading about the results of those cases. While Defendant  
 12 states in its opposition that the Company prevailed in *Johnson v. RGIS*, a review of the court's  
 13 summary judgment decision shows that it found triable issues of fact with respect to Ms. Johnson's  
 14 donning time claims, pre and post-inventory waiting time claims, travel time claims after March  
 15 2004, and her overtime claims. *Johnson v. RGIS*, Memorandum And Order of May 29, 2007 at 40;  
 16 Wallace Reply. Decl. ¶23.

17 Moreover, in 2004 RGIS entered into a substantial class monetary settlement regarding its  
 18 failure to compensate its auditors for all hours worked. In a California case known as "RGIS  
 19 Inventory Specialists Cases," Judicial Council Coordination Proceeding No. 4328, RGIS agreed to  
 20 pay a California class of auditors and team leaders who worked at RGIS between January 1, 1999  
 21 and December 31, 2004 the sum of \$20 million. The settled claims included failure to accurately  
 22 pay daily or weekly overtime, failure to pay for all hours worked, failure to pay full compensation  
 23 for travel time, and failure to keep accurate records and to provide proper itemized statements of  
 24 earnings and work hours to employees. (Wallace Reply Decl. ¶16 Ex. H).

25  
 26 employer who is armed with this knowledge cannot stand idly by and allow an employee to perform  
 27 overtime work without proper compensation, even if the employee does not make a claim for the overtime  
 28 compensation.").

1 Because RGIS has known that many employees perform significant amounts of unpaid off-  
 2 the-clock work, under federal law RGIS was required to make "every effort" to prevent such  
 3 unpaid work from taking place. As Plaintiffs now show, RGIS has failed to adopt and implement  
 4 policies and procedures reasonably calculated to ensure that auditors, team leaders, and associate  
 5 area managers are accurately paid for all time worked.

6 **B. RGIS Is Highly Centralized And Has Uniform Policies And Procedures Regarding**  
 7 **Paying Its Auditor Employees**

8 In its opposition brief, Defendant asserts that RGIS is a decentralized company in which  
 9 local supervisors determine policies and procedures regarding auditor pay. Any such contention is  
 10 false. A review of the Company's policy documents confirms that all RGIS districts in the United  
 11 States must comply with the policies and procedures stated in the "Auditor's Handbook-United  
 12 States" and the "Field Policy Manual-United States." The RGIS Field Policy Handbook-United  
 13 States expressly states that all local districts must follow the policies contained therein, and that  
 14 any local policies or decisions that deviate from the Field Policy Manual-United States are  
 15 unauthorized. The Auditor's Handbook-United States (March 2004) states:

16 RGIS has developed this handbook for two reasons:

- 17 • To set forth certain policies, rules, standards, and procedures which the newly-  
 18 hired RGIS auditor should be aware of
- 19 • To help clarify terminology as it applies to our business

20 The Field Policy Manual states:

21 The RGIS Field Policy Manual sets forth the Company's policies for the following  
 22 categories of employees: ... Division Vice Presidents, Operations Managers, Regional  
 23 Managers, District Managers ... Area Managers, Crew Managers, Associate Area  
 24 Managers, Assistant Crew Managers.

25 The function of this Manual is ... to guide you in the performance of your duties, and to  
 26 provide you with insight into your role in the overall organization.

27 This Manual sets forth current Company policy and supersedes all previously issued policies  
 28 and policy manuals.

Decision making which deviates from these policies will be considered unauthorized and  
 may lead to disciplinary action unless prior approval has been obtained from Headquarters.

1 For these reasons, every employee to whom this Policy Manual applies must be familiar  
2 with its contents.

3 Employees governed by the policies of this Manual must fill out and sign the appropriate  
4 Acknowledgement form for this RGIS Field Policy Manual.

5 Field Policy Manual at p.1, RGIS WRN 03400; Wallace Reply Decl. Ex. E.

6 Under the November 2005 Field Policy Manual –United States, District Managers, Area  
7 Managers and other RGIS employees who supervise inventories must sign an “acknowledgement”  
8 of the following RGIS policy:

9 I acknowledge that I have read the November, 2005 version of the United States Field  
10 Policy Manual and am bound to the policies contained in this Manual and any revisions, and  
11 that my continued employment is contingent upon following those policies.<sup>12</sup>

12 The foregoing statement did not appear in prior RGIS versions of the Field Policy Manual.

13 Defendant’s Rule 30(b)(6) designee on the topic of auditor compensation policies, Ms.  
14 Cynthia Myers, testified that the Auditor’s Handbook and the Field Policy Manual apply to all  
15 RGIS employees throughout the United States, and to all RGIS districts in the United States.  
16 Myers Depo. at 24:21-23; 108:25-109:14; Wallace Reply Decl. ¶10. Ms. Myers also testified that  
17 the Auditor’s Handbook applied to all RGIS auditors in the United States, and that it contains  
18 RGIS’ policies and procedures with respect to auditor employees. Myers Depo. 109:18-25.  
19 Finally, Ms. Myers testified that all of RGIS’ policies regarding the recording of compensation for  
20 auditors would be contained in the Auditor’s Handbook, Field Policy Manual, or the “time sheet  
21 guideline.”<sup>13</sup>

22 In addition to relying upon uniform written policies regarding auditor pay, RGIS utilizes a  
23 centralized computer payroll system that tracks all time records and which generates pay stubs for

24 <sup>12</sup> RGIS Inventory Specialists Field Policy Manual-November 2005, Page 89, RGIS WRN 03488 (emphasis  
25 added); Wallace Reply Decl. ¶10 Ex. E.

26 <sup>13</sup> Myers Depo. 58:19-61:4; 64:23-65:5 (“Q: Other than e-mails or statements that might be made in  
27 response to a specific question, are there any instructions or guidance or policies or procedures regarding  
28 the kind of work that’s compensable or how time is to be recorded that is not contained in the time sheet  
guideline or the Field Policy Manual or the Auditor’s Handbook? A: Not that I’m aware of.”)

the individual auditors. As Ms. May, the Payroll Manager for RGIS, testified at deposition, the Company's Oracle system processes time records from all RGIS districts, and generates payroll based on those records according to the system's programming. May Depo. at 6:20-7:17; 14:19-15:5; 48:19-49:9; Wallace Reply Decl. ¶27, Ex. V. Further, the form of the statement of earnings that is generated by the Company for auditors, as well as the type of information contained on the form, is the same throughout the United States. May Depo. at 20:24-21:18.

**C. RGIS Policy In The "Auditor Handbook-United States" And The "Field Policy Manual-United States" Does Not Require That Auditors Be Paid For Pre-Inventory Donning, Preparation And Waiting Time**

As discussed in Plaintiffs' opening brief, RGIS written policy, as stated in the Auditor's Handbook, does not require that auditors be paid for performing necessary pre-inventory tasks such as donning specialized equipment, attending mandatory pre-inventory meetings and any time spent waiting for an inventory to begin. The Auditor's Handbook contains the following information about how auditors are to be paid for their work at inventories:

**STORE STARTING TIME**-An inventory scheduled for a 6:00 PM start means just that. Pulling into the parking lot at 6:00 PM is not being punctual—you must be ready to start work at 6:00 PM. While the pre-inventory instructions and assignments are being given out, your attention and cooperation is expected.

**TIME SHEETS**-A Time Sheet is a form listing all RGIS personnel working a particular inventory and is the document from which your pay is prepared. It is your responsibility to make sure that your name and your correct Badge ID Number are legibly recorded on a Time Sheet at every inventory, and that you are listed as a driver if you transport people (at the request of RGIS) to a "travel inventory." Time In is the scheduled inventory start time and Time Out is when you have completed your responsibility in an inventory. **Please use dark blue or black ink only on time sheet;** do not use pencil.

Auditors Handbook-United States at 16, 18. Wallace Decl. ¶10 Ex. F.

Thus, "Time In" —when the clock starts running at the "scheduled inventory start time"—happens *after* the "pre-inventory instructions and assignments" are given out. Also, auditors are required to be "ready to start work" at the "Store Starting Time." This requires them to have donned their counting gear (the Audit, belt and laser), and to have already received the "pre-inventory instructions and assignments." The inevitable result of this policy is that employees are not clocked in while they don their equipment or while they attend mandatory pre-inventory

1 meetings. Plaintiffs' allegations that this policy results in employees working off-the-clock hours  
 2 are supported by Plaintiffs' Declarations filed in support of this motion. *See* Lee Reply Decl. ¶¶6-  
 3 8 (collecting and citing declaration testimony).

4 The Field Policy Manual does not contain any written policies or procedures that would  
 5 function to cure this defect in the Auditors Handbook. The Field Policy Manual United States  
 6 contains no policy or procedure that requires supervisors to sign-in auditors prior to donning their  
 7 equipment and attending mandatory meetings. Nor does the Field Policy Manual expressly and  
 8 specifically require that auditors be signed in prior to performing any work-related tasks for local  
 9 or travel inventories. In fact, the Field Policy Manual does not address the subject of donning  
 10 RGIS equipment or the subject of time spent engaged to wait prior to the start of an inventory.  
 11 Similarly, the Auditor's Handbook-United States does not contain any policies or procedures that  
 12 specifically require that auditors be signed in prior to performing these work tasks for the benefit  
 13 of RGIS. Finally, the "time sheet guidelines" referenced by Ms. Myers at her deposition as  
 14 providing information to supervisors on how to complete time records also do not specifically  
 15 address donning time, waiting time, or the procedure to be followed at inventories when auditor  
 16 employees are to be signed in to work. Wallace Reply Decl. ¶28, Ex. W.

17 In summary, the terms of the Auditors Handbook with respect to the start of inventory and  
 18 time-in procedures are inadequate because they may fairly be read by a reasonable person to  
 19 permit—if not require—auditors and other employees to complete work activities necessary to the  
 20 inventory prior to being signed-in and on the clock. Moreover, as Ms. Myers testified at  
 21 deposition, RGIS does have any monitoring instruments that specifically address whether  
 22 employees are being paid for donning time or waiting time. Myers Depo. at 44:7-45:22. In brief,  
 23 RGIS policies and procedures in the area of donning time and waiting time fall well short of the  
 24 FLSA requirement that the Company must make "every effort" to ensure that employees do not  
 25 work off the clock.

26 **D. RGIS Has No Specific Written Policy Against Off-The-Clock Work, And Has**  
 27 **Failed To Take Reasonable Steps To Prevent Off-The-Clock Work**  
 28

1 A review of the Auditors Handbook-United States and the Field Policy Manual-United  
 2 States shows that neither of them contain any written policy against auditors being asked to  
 3 perform off-the-clock work, or any specific prohibition against the passive acceptance by  
 4 supervisors of off-the-clock work by their subordinates. As discussed, the language of the FLSA's  
 5 regulations makes clear that the promulgation of such a policy is an elemental first step that all  
 6 employers must take to ensure that low-level employees do not do work that goes unpaid. The  
 7 regulations stress that "The mere promulgation of a rule against such work is not enough.  
 8 Management has the power to enforce the rule and must make every effort to do so." 29 C.F.R. §  
 9 785.13 (emphasis added). *See also Chao v. Pacific Stucco, Inc.*, No. 2:04-CV-0891, 2006 WL  
 10 2432862, \*6 (D. Nev. Aug. 21, 2006) ("While actual or constructive knowledge is required,  
 11 Defendants fail to point out that an employer has constructive knowledge if he fails to make efforts  
 12 to enforce company policies in such a way as to prevent FLSA violations. Merely promulgating  
 13 company policies without further enforcement is insufficient .... [quoting 29 C.F.R. § 785.13]");  
 14 *Wilks*, 2006 WL 2821700, at \*5; *Cunningham v. Gibson Elec. Co.*, 43 F.Supp.2d 965, 975 (N.D.  
 15 Ill. 1995); *Martin v. Funtime, Inc.*, 792 F.Supp. 539, 542 (N.D. Ohio 1991).

16 However, Defendant's Rule 30(b)(6) designee on policies and procedures regarding auditor  
 17 compensation testified that RGIS does not specifically address donning time or waiting time in its  
 18 annual audits and sample employee surveys about auditor compensation. Myers Depo., 44:7-  
 19 45:22. In addition, RGIS does not monitor the accuracy of time records regarding travel. *See*  
 20 Myers Depo., 87:17 – 88:5. In at least these respects, the Company has failed to take obvious and  
 21 necessary steps to ensure that off-the-clock work is not taking place.<sup>14</sup>

22  
 23 <sup>14</sup> The Field Policy Manual-United States does contain the general statement that "RGIS pays hourly  
 24 employees for all time worked. All work time must be recorded on the Time Sheet." Field Policy Manual-  
 25 United States §4.04 at p. 15 (RGIS WRN 03414). This amounts to a generic statement that RGIS complies  
 26 with the FLSA's requirement that employees are paid for all hours worked. As discussed above, however,  
 27 "The mere promulgation of a rule against such work is not enough. Management has the power to enforce  
 28 the rule and must make every effort to do so." RGIS's generic statement of compliance is inadequate to  
 ensure that supervisors accurately track employee work time because, *inter alia*:

a) The Manual does not provide supervisors with any definition of the term "work."  
 For this reason, the policy is unclear as to whether donning time, time spent waiting for an inventory to

1 In summary, RGIS is a large and sophisticated company with worldwide operations. Its  
 2 failure to adopt an express written policy prohibiting off-the-clock work, and its failure to use any  
 3 of the monitoring mechanisms available to a company with a modern human resources department  
 4 to make sure that low-level employees are paid for all time worked, falls short of making “every  
 5 effort” to ensure that its employees are paid for all time worked.

6 **E. RGIS’ Written Policy Against Paying Its Employees For Two Hours Of “Commute**  
 7 **Time” Per Shift Is Unlawful Because It Arbitrarily Fails To Separate Compensable**  
 8 **Work Time From Non-Compensable Commute Time**

9 As discussed, the FLSA mandates that employees must be accurately paid for all time  
 10 worked. Pursuant to RGIS’ Travel Time policy, the Company admits that at least some of the time  
 11 that employees spend traveling to and from the so-called “travel inventories” is compensable  
 12 “work time” that must be paid by the Company. The Company’s concession in this regard is  
 13 unsurprising given that RGIS’ ability to provide its services to its customers at various locations is  
 14 essential to its business. Of course, to count inventory the Company must bring its workforce to

15 begin, or time spent by auditors in pre-inventory meetings is considered “work time” that must be recorded.  
 16 A reasonable supervisor may well read this language in the Field Policy Manual as not including donning  
 17 time, pre-inventory meetings or waiting time.

18 b) This policy does not pro-actively and clearly instruct supervisors that they are to  
 19 count donning time, time spent waiting for an inventory to begin, or time spent in pre-inventory meetings as  
 20 “work time” that must be recorded on the Company’s time sheets.

21 c) The policy does not instruct supervisors that donning time, time spent waiting for an  
 22 inventory to begin, or time spent by auditors in pre-inventory meetings is “work time” even if auditors  
 23 perform these tasks prior to the start of any inventory without being asked to do so by their supervisors. In  
 24 this regard, it is significant that the Manual does not give managers any guidance on how to ensure that  
 25 auditors and other employees are paid for donning time or waiting time if they perform such activities  
 26 without being asked to do so by their supervisors.

27 d) The policy does not expressly instruct supervisors that auditors are not to perform any work  
 28 tasks, including donning their equipment or participating in pre-inventory meetings, prior to being signed-in  
 on the clock.

29 In short, the Company’s general policy regarding complying with the FLSA is not specific enough to ensure  
 30 that supervisors understand what specific steps that they are required to take in order to make sure that  
 31 donning time, “engaged to wait” time, and pre-inventory meetings take place on the clock. Moreover, even  
 32 if the Company’s policy were specific enough, Plaintiffs’ Declaration testimony shows that the Company  
 33 does not make reasonable efforts –let alone “every effort”—to ensure that its general policy regarding  
 34 compensation is actually followed in the field.

distant locations so that non-local clients can be served, and a profit can be made. For this reason, there can be little doubt that traveling to inventories primarily benefits RGIS. Because many low-income employees do not own vehicles, or do not own reliable (or insured) vehicles that would enable them to travel on their own to travel stores, it makes sense for RGIS to arrange Company vehicles to transport its workforce in order to serve the Company's clients. RGIS's own declarants acknowledge this. *See* Sunshine Reply Decl. ¶16. In addition, organizing transportation enables RGIS to ensure adequate and timely staffing at far-flung locations. *See, e.g.,* Park Reply Decl., Ex. G, Depo. of Natal, 65:23 – 66:8; Ex. D, Depo. of Hayes, 63:19 – 64:1.

The RGIS travel policy differentiates between "commute time," which is not compensated, and "Travel Time," which is compensated. The 2005 Field Policy Manual, "Commute Time and Travel Time," states:

**Definitions:**

Commute Time: Time that is not considered to be time worked. RGIS hourly employees will not be compensated for "Commute Time".

Travel Time: Time that is considered to be time worked. RGIS hourly employees will be compensated for "Travel Time" at the prevailing minimum wage.

...

**Travel Pay "To & From" Inventories: Hourly Employees**

"Commute Time" is the first 1 hour of transportation for the employees from the "Meet Site" to the inventory and the first 1 hour of transportation from the inventory back to the "Meet Site". "Commute Time" is unpaid.

"Travel Time" commences following the first unpaid 1 hour of "Commute Time" from the "Meet Site" and is paid to the employee for the remainder of the trip to the inventory. The same method applies to the return trip from the inventory back to the "Meet Site." "Travel Time" is paid at the prevailing minimum wage.

Thus, RGIS admits that "Travel Time" is "time worked." Accordingly, under the FLSA, the Company has a duty to ensure that it accurately measures and records "Travel Time." RGIS policy, however, arbitrarily establishes that at least two hours per shift are "commute time" instead of "travel time." Defendant has not and cannot cite any authority that would permit it to adopt an arbitrary, across-the-board national standard of two hours of unpaid "commute time" per day for all districts in the United States. The reason for this is simple: the average or normal commute

1 time in each district will vary based on local traffic conditions and distances. Under the FLSA, the  
 2 Company is under an obligation to make reasonable efforts to determine the average commute time  
 3 in its various districts, or at least to utilize some other rational approach to estimating the amount  
 4 of commute time in each of its Districts, rather than just adopting a blanket two-hour standard that  
 5 applies equally to areas as different in terms of traffic and travel conditions as Los Angeles and  
 6 Iowa, or metropolitan New York and rural upstate New York.

7 At best, the RGIS Travel Time policy constitutes an arbitrary and blunderbuss effort at  
 8 estimating hours worked, a practice that is prohibited by the FLSA and its accompanying  
 9 regulations. Under applicable law, RGIS cannot “estimate” hours worked, but must instead  
 10 accurately record and calculate the compensable “work time” that auditors incur while traveling.  
 11 *See, e.g., Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 128 (3d Cir. 1984) (“Estimating  
 12 hours worked, however, violates section 11(c) of the FLSA, 29 U.S.C. § 211(c), which requires  
 13 employers to maintain accurate records to ensure that all workers are paid minimum wage for  
 14 every hour worked.”); *Wirtz v. Williams*, 369 F.2d 783, 785 (5th Cir. 1966) (“The evidence is thus  
 15 clear that the appellee has not kept records of the actual time consumed by the truck drivers on the  
 16 various trips but has recorded only an assigned estimated number of hours that the trips were  
 17 supposed to consume. Clearly, appellee has not fulfilled his duty to keep accurate daily and  
 18 weekly records of the hours actually worked by each employee.”); *Dole v. Enduro Plumbing, Inc.*,  
 19 1990 WL 252270, No. 88-7041-RMT (KX), at \* 6 (C.D. Cal. Oct. 16, 1990) (“[T]he  
 20 uncompensated time is measured in the same way that hours worked are determined for any  
 21 purpose under the FLSA, *i.e.* all time during which the employee was ‘suffer(ed) or permit(ted) to  
 22 work’ is included (see Section 3(g) of the FLSA); an employer cannot substitute his own estimate  
 23 of the time that he believes the employee should have spent.”).

24 Because RGIS determines compensable “travel time” by arbitrarily subtracting two hours of  
 25 “commute time” from the total time an employee spends in transit, RGIS is merely estimating the  
 26 amount of compensable travel time it should pay to its employees. This violates the FLSA.

27 Defendant’s reliance on the Portal-to-Portal Act, and case law decided under that Act, is  
 28 misplaced because neither the Portal-to-Portal Act, nor the precedents that interpret it, address the

1 circumstance presented here in which a Company admits in its own policies that at least some  
 2 portion of “travel time” is “work time” that must be paid for under the FLSA. Thus, while it is  
 3 true that the FLSA and the Portal-to-Portal Act except travel that is preliminary or postliminary to  
 4 the actual place of performance of an employee’s principal activity, *see* 29 U.S.C. § 254(a),  
 5 because RGIS itself defines “travel time” to be “time worked,” at least some portion of the travel  
 6 time to the travel inventory is not preliminary or postliminary within the meaning of the Portal-to-  
 7 Portal Act. This is logical: inventories are conducted where the stores are located, so traveling to  
 8 each store to conduct an inventory is an “indispensable and integral” part of the employees’ jobs.

9 In summary, RGIS has no policy, definition, or explanation of why the first 60 minutes of  
 10 travel to and from a travel store is considered non-compensable “Commute Time.” This “first 1-  
 11 hour” rule is arbitrary because it fails to consider what portion of travel is part of the employees’  
 12 normal commute, and it imposes the standard nationally. For RGIS employees who travel to travel  
 13 stores and then return home, ordinary commute time is not necessarily one hour. RGIS has no  
 14 policy or procedure for establishing accurate “travel times” and “commute times” for its districts,  
 15 and no policy of paying employees for actual “travel time” as opposed to estimated “travel time.”

16 **III. PLAINTIFFS WILL BE ABLE TO PROVE THE AMOUNT OF TIME**  
 17 **EMPLOYEES HAVE NOT BEEN PAID BY USING A STATISTICAL ANALYSIS**  
 18 **OF DEFENDANT’S PAYROLL AND TIME RECORDS; IT WILL NOT BE**  
 19 **NECESSARY FOR THIS COURT TO HEAR TESTIMONY FROM MORE THAN**  
 20 **A REPRESENTATIVE SAMPLE OF EMPLOYEES**

21 RGIS’ common policies and procedures far outweigh any individual issues in this case, and  
 22 any individual variables are fairly limited and easily manageable by this Court. Should it be  
 23 determined that Defendant is liable for unpaid compensation to Plaintiffs, a formula can be used  
 24 inserting rate of pay, number of regular shifts, and other necessary information to determine the  
 25 amount of the Company’s liability. *See, e.g., Wilks*, 2006 WL 2821700 at \*7 (noting that the court  
 26 could bifurcate “the case into a liability stage, where the parties could address the alleged existence  
 27 of an impermissible policy or practice, and a damages one, where they could, if necessary, debate  
 28 the impact of that policy or practice on individual plaintiffs.”).

Indeed, there are numerous well-established pragmatic approaches approved by many courts  
 permitting Plaintiffs to satisfy their burden of proof at trial in an efficient manner by showing the

1 extent of work performed by class members through the use of representative testimony, class  
 2 surveys, sampling, or mini-trials in FLSA class actions.<sup>15</sup> The use of such representative testimony  
 3 to show damages is a common practice in FLSA off-the-clock class actions. *See, e.g., Reich v. S.*  
 4 *New England Telecomms. Corp.*, 121 F.3d at 67 (“[Plaintiffs] need not present testimony from  
 5 each underpaid employee; rather, it is well-established that [they] may present the testimony of a  
 6 representative sample of employees as part of [their] proof of the prima facie case under the  
 7 FLSA.”).

8 In addition to representative testimony, Plaintiffs may also rely upon expert analysis or  
 9 statistical evidence of hours worked to prove individual losses.<sup>16</sup> In this case, Ms. Myers testified  
 10 at deposition that records maintained by the Company’s Oracle computer system could be used  
 11 (with some exceptions) to determine actual hours worked by individual employees, thus permitting  
 12 an accurate determination of what a particular employee’s wages should have been. For example,  
 13 Ms. Myers testified that it should be possible to calculate an employee’s hours by determining the  
 14

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15  
 16 <sup>15</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (“[A]n employee has carried out his  
 17 burden if he proves that he has in fact performed work for which he was improperly compensated and if he  
 18 produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable  
 19 inference”); *Grochowski v. Phoenix Constr.*, 318 F.3d, 80, 88 (2d Cir. 2003) (noting that plaintiffs do not  
 20 need every employee to testify in order to prove FLSA violations or recoup back-wages, but must “present  
 21 sufficient evidence for the jury to make a reasonable inference as to the number of hours worked by the  
 22 non-testifying employees.”); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 66-68 (2d Cir. 1997)  
 23 (holding that plaintiffs satisfied their burden by providing representative testimony concerning 2.5% of the  
 entire class of employees owed back wages); *Reich v. Stewart*, 121 F.3d 400, 406 (8th Cir. 1997) (holding  
 plaintiff testimony and documentary evidence of the number of hours worked to support an award of back  
 wages); *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985) (“There is no requirement that  
 to establish a *Mt. Clemens* pattern or practice, testimony must refer to all nontestifying employees. Such a  
 requirement would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt.*  
*Clemens*.”).

24 <sup>16</sup> *See, e.g., Reich v. Waldbaum, Inc.*, 833 F. Supp. 1037, 1048-49 (S.D.N.Y. 1993) (the court concluded that  
 25 a computer specialist’s method of calculating actual hours worked by non-testifying employees through  
 26 process of “within-store averaging” or “across-store-averaging” was a reasonable method to show class  
 damages); *McLaughlin v. DialAmerica Mktg, Inc.*, 716 F. Supp 812, 816-17 (D.N.J. 1989) (the court  
 27 awarded back wages to both testifying and non-testifying employees based on a compliance specialist’s  
 28 calculations derived from a computerized summary of the available data and using formulas to reconstruct  
 actual hours worked from the records of units of production); *Bell v. Farmers Ins. Exch.*, 115 Cal.App.4th  
 715, 746-751 (2004).

number of hours that elapsed between the “meet time” and the “return time,” and then subtracting two hours of “commute time” plus any off-duty meal period. Myers Depo., 97:12-98:9.

**A. The Company’s Written Policies And Procedures Regarding Compensation, As Well As Its Centralized Payroll System, Also Apply To Team Leaders And Associate Area Managers**

RGIS employees who have worked as Assistant Team Leaders, Team Leaders, and Associate Area Managers are also “similarly situated” because they are subject to the defective compensation and timekeeping policies and procedures discussed above. Each RGIS employee carrying these titles must sign an “acknowledgement” stating that they have read the Field Policy Manual and that their employment is contingent upon following the policies that it contains. *See* RGIS Inventory Specialists Field Policy Manual-November 2005, pg. 92 (Associate Area Manager Acknowledgment), pg. 94 (Crew Managers Acknowledgment), pg. 95 (Assistant Crew Managers Acknowledgment); Wallace Reply Decl. ¶10, Ex. E. Moreover, all of these RGIS employees perform the same primary duty of counting merchandise.<sup>17</sup> As with the Auditors, Assistant Team Leaders, Team Leaders, and Associate Area Managers have not been compensated for all hours worked off the clock, including donning time, waiting time and pre-shift tasks and work-related travel time. Thus, Plaintiffs have satisfied the lenient burden for conditional certification.

**IV. PLAINTIFFS ARE NOT REQUIRED TO SHOW THAT THE AUDITORS ARE IDENTICALLY SITUATED, ONLY THAT THEY ARE SIMILARLY SITUATED**

**A. It Is Undisputed That Auditors Perform The Same Job Duties At Each Work Site, And That They Are Subject To Uniform Written Policies And Procedures Regarding Compensation**

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<sup>17</sup> *See, e.g.*, Declaration of Claudia Adams at ¶8; Declaration of Tiffany Bechere at ¶6 (Auditor and Team Leader); Declaration of Renee Blake at ¶7 (Auditor and Team Leader); Declaration of Anna Marie Butler at ¶7 (Auditor, Team Leader and Assistant Team Leader); Declaration of Sally Chandler at ¶7 (Auditor and Team Leader); Declaration of Lori Griffith at ¶5 (Auditor and Team Leader); Declaration of Connie Harman at ¶6 (Auditor, Team Leader and Associate Area Manager); Declaration of Carol Holmgren at ¶7 (Auditor and Team Leader); Declaration of Melani Manos at ¶8 (Assistant Team Leader and Team Leader); Declaration of Bo Paulsen at ¶6 (Assistant Team Leader and Team Leader); Declaration of Rachel Perez at ¶6 (Auditor and Team Leader); Declaration of Pierson at ¶7 (Auditor and Team Leader); Declaration of Cynthia Piper at ¶11 (Auditor and Team Leader); Declaration of Jennifer Saalsaa at ¶6 (Auditor and Assistant Team Leader); Declaration of Linda Tebay at ¶8 (Auditor and Assistant Team Leader).

1 The duties of all RGIS auditors throughout the United States are laid out in the Auditors  
 2 Handbook-United States. Wallace Reply Decl. ¶10 Ex. F. At deposition, Ms. Myers conceded  
 3 that auditors essentially perform the same job duties throughout the United States. Myers Depo. at  
 4 65:17 – 67:3. Similarly, Ms. Myers testified that all auditors are subject to the written policies and  
 5 procedures stated in the Auditors Handbook-United States and the Field Policy Manual-United  
 6 States, which include all RGIS policies regarding compensation. *Id.* at 108:25 – 109:25.

7 **B. It Is Well-Settled That Conditional Certification Does Not Require That All**  
 8 **Members Of The Class Have Identical Claims Or That They Have Been Denied**  
 9 **Compensation For The Exact Same Amount Of Hours Worked; Defendant's**  
 10 **Evidence Of Minor Factual Variations Does Not Establish That The Putative Class**  
 11 **Members Are Not "Similarly Situated"**

12 Numerous courts have held that the "similarly situated" standard of § 216(b) does not  
 13 require that either the claims or injuries of the putative class members be identical, as Defendant  
 14 erroneously contends in its opposition. In its decision granting conditional certification of an off-  
 15 the-clock claim, the court in *Thiebes* held that the similarly situated requirement is "less stringent  
 16 than the requirement under Fed.R.Civ.P. 23(b)(3) that common questions of law or fact  
 17 predominate," and "[a]s such, the claims and positions of employees need not be identical in order  
 18 to meet the lower standards of § 216(b)." 1999 WL 1081357, at \*2 (citations omitted). The  
 19 Eleventh Circuit reached the same conclusion in *Hipp v. Liberty National Life Insurance*, where it  
 20 held that under § 216(b) "[p]laintiffs need show only that their positions are similar, not identical,  
 21 to the positions held by the putative class members." *Hipp*, 252 F.3d 1208, 1217 (11th Cir. 2001)  
 22 (citation omitted).<sup>18</sup>

23 <sup>18</sup> See also *Wilks*, 2006 WL 2821700, at \*3 ("Notably, even at the decertification stage, *similarly* situated  
 24 does not mean *identically* situated.") (emphasis in original); *Hayes v. Laroy Thomas, Inc.*, No. 5:05CV227,  
 25 2006 WL 1004991, at \*6 n.3 (E.D. Tex. Apr. 18, 2006) ("[P]laintiffs need only show that their positions are  
 26 similar, not identical."); *Mazur v. Olek Lejbzon & Co.*, No. 05 Civ. 2194(RMB)DF, 2005 WL 3240472, at  
 27 \*5 (S.D.N.Y. Nov. 30, 2005) (granting conditional certification of broad class of employees in off-the-clock  
 28 overtime case and holding, "Contrary to Defendants' implication, Plaintiffs need not show that they are  
 'identically situated to potential class members' for approval of a collective action; rather, Plaintiffs need  
 only provide evidence that a 'demonstrated similarity' exists among individual situations. Plaintiffs have  
 done this. Each of the declarations submitted by Plaintiffs establishes a likelihood that at least some of  
 Defendants' other employees, who are alleged to have performed the same or similar work as Plaintiffs, for  
 the same or similar amount of hours per week, were also not paid overtime as required under the FLSA."  
 (citation omitted)).

1 Indeed, in *Burch v. Qwest Communications*, one district court recently rejected the same  
 2 argument that Defendant makes here: that differing amounts of unpaid work time between putative  
 3 class member shows that employees are not similarly situated. *See Burch*, 500 F. Supp. 2d 1181,  
 4 1189 (D. Minn. 2007). The court reached this conclusion even though the differences between  
 5 class members were far greater than those Defendant points to in this case. The court held:

6 Defendants also argue that Plaintiffs and opt-in Plaintiffs are not similarly situated because  
 7 their affidavits allege widely varying amounts of time worked off the clock, from 15-20  
 8 minutes per week to 10-20 hours per week. However, most affidavits alleged between 2 and  
 9 4 hours of off-the-clock work per week. The Amended Complaint alleges that Plaintiffs and  
 10 similarly situated individual work, on average, 30 minutes per day off-the-clock per person,  
 which is consistent with the majority of the affidavits. The variation in off-the-clock time is  
 “more appropriately addressed after the completion of discovery and during the second  
 stage of the certification determination.” *Id.* (citation omitted)

11 Indeed, courts have rejected the argument that differences between class members in the  
 12 amount of unpaid work hours defeats commonality or typicality even under the higher standard for  
 13 class certification set by Rule 23. As the district court explained in *Trotter v. Perdue Farms, Inc.*,  
 14 No. CIV.A.99x-893-RRM, 2001 WL 1002448 (D. Del. Aug. 16, 2001) in its order granting  
 15 F.R.C.P. Rule 23 class certification of an off-the-clock case involving donning and doffing claims:

16 [D]efendants contend that differences in the physical layout of the plants means [sic] that  
 17 some workers take more time to obtain and sanitize equipment than others ... There are  
 18 often small variables between plaintiffs’ claims in a class action. These differences should  
 19 not necessarily derail a class action. In this case, if plaintiffs can succeed on the merits, they  
 20 will have to justify a damage figure for each member of the class. That work will take into  
 account the average time lost by each class member that is required to obtain, don, doff, and  
 sanitize equipment . . .

21 *Trotter*, 2001 WL 1002448, at \*1-2.

22 **C. Evidence Regarding Different Amounts Of Unpaid Wages Does Not Preclude**  
 23 **Conditional Certification; Such Differences Are Addressed At The Damages Stage**

24 In *Adams v. Inter-Con Security Systems*, Judge Patel held that variation in damages between  
 25 class members stemming from differences in the amount of off-the-clock work was irrelevant to  
 determining the question of conditional certification. As Judge Patel explained:

26 [D]efendant claims that an action for off-the-clock pay violations is not generally  
 27 suitable for collective action certification and that conditional certification should be  
 28 denied “where an off-the-clock claim requires significant individual considerations . . .”

... [T]he policies alleged by plaintiffs are not just instructed verbally by supervisors, but are also described in employee handbooks and job applications . . . [D]efendant's concern about the potentially individualized nature of determining damages is irrelevant in considering conditional certification. The threshold inquiry does not require that the extent of the potential plaintiffs' damages be identical or even similar. Whether each plaintiff is due a different amount in damages does not affect whether they were "together the victims of a single decision, policy or plan." Therefore, actions with off-the-clock allegations are suitable for collective action certification.

*Id.* at 536-7 (citations omitted). Numerous other courts have held that variations in individual damages are not relevant at the conditional certification stage.<sup>19</sup>

#### V. **DEFENDANT'S RELIANCE ON THE COURT'S DECERTIFICATION DECISION IN *JOHNSON v. RGIS* IS MISPLACED**

Defendant's reliance on the court's decertification decision in *Johnson v. RGIS* is misplaced. This case presents different challenges to Defendant's written policies than those raised in the *Johnson* case, and presents new authorities in support of Plaintiffs' position, including applicable case law supporting conditional certification of off-the-clock claims. Moreover, the instant motion also presents significant new evidence regarding the centralization and uniformity of Defendant's compensation policies and payroll system. In contrast, the court's decision in *Johnson* was based solely on evidence regarding a single Texas district, District 166.

A review of Judge Crone's decertification decision reveals that it did not address any of the arguments, evidence or authorities proffered herein. Judge Crone did not address Plaintiffs' challenges to the written terms of either the Auditor's Handbook-United States or the Field Policy Manual-United States. In fact, Judge Crone sidestepped any consideration of the lawfulness of RGIS' written policies on the basis that the District 166 manager, Ron Eckerle, testified at deposition that he had discretion not to follow those policies. Memorandum and Order of March

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<sup>19</sup> See, e.g., *Gieseke v. First Horizon Home Loan Corp.*, 408 F. Supp. 2d 1164, 1168 (D. Kan. 2006) ("Individual differences in damages are not to be considered when ruling on conditional certification and 'will not defeat [conditional] class certification . . ."); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 183 (W.D.N.Y. 2005) (finding that individual class damages issues did not preclude certification and noting that although "the question of how many hours of overtime each plaintiff worked is particular to each plaintiff, nonetheless, the methodology utilized presumably will be similar or identical: ascertain the appropriate time recording procedures utilized, review the applicable time records and determine the applicable rate of pay from the hourly wage paid each employee.")

26, 2007 at 12 (“The former manager of District 166, Ronald Eckerle, exercised significant discretion in implementing RGIS’s corporate policies, including pay provisions.”). Defendant has presented no such evidence here. More importantly, Plaintiffs proffer evidence on this point that was not presented to Judge Crone: that, by RGIS policy, District managers are required to sign an agreement stating that they must follow the compensation policies and procedures stated in the Auditor’s Handbook-United States and the Field Policy Manual-United States or risk termination. Under the Field Policy Manual-United States, District Managers, Area Managers and other RGIS employees who supervise inventories must sign an “acknowledgement” of RGIS policy:

I acknowledge that I have read the November, 2005 version of the United States Field Policy Manual and am bound to the policies contained in this Manual and any revisions, and that my continued employment is contingent upon following those policies.

RGIS Field Policy Manual, RGIS WRN 03488; Wallace Reply Decl. ¶10, Ex. E.

Had this evidence been presented to Judge Crone for consideration, there is every reason to believe that she would have reached a different conclusion about the existence and nature of the Company’s written policies and procedures about compensating its auditors. However, because Judge Crone believed that district managers had unfettered discretion to depart from the Company’s written policies, she did not consider Plaintiffs’ policy-based challenges in her decertification opinion. *Id.* (“Thus, regardless of the legality of the policies themselves, each of the plaintiff’s claims would still require an individualized inquiry into whether and how the policies were implemented by the district manager and the particular supervisor in charge.”). Instead, her decertification decision was based on a detailed analysis of the deposition testimony of the eleven opt-ins from District 166 who appeared for deposition in that case, and an analysis of their individual workplace experiences.

Similarly, to the extent that Defendant relies upon Judge Crone’s initial decision to certify a class of auditors within District 166 as opposed to a national class, it must be emphasized that both the evidentiary record and written policy challenges presented in the case at bar are far different from those presented in *Johnson*. Plaintiffs’ motion for conditional certification in the *Johnson* case, filed almost two years ago, was skeletal. At that point, Plaintiffs were only able to present

1 the allegations of the complaint, and the declaration testimony of one employee, Ms. Johnson, who  
 2 worked in District 166. Wallace Reply Decl. ¶23. Because of Plaintiffs' minimal presentation,  
 3 the court declined to certify a national class, and limited conditional certification to District 166.

4 Finally, the Texas court's decision in *Johnson* conflicts with applicable precedent in this  
 5 Circuit. Both the Ninth Circuit and this district court have rejected the argument that a company's  
 6 failure to ensure that its local supervisors follow company policies provides a basis for the denial  
 7 of class certification.<sup>20</sup> Indeed, permitting companies to avoid class certification because they fail  
 8 to ensure that their supervisors comply with company policies against off-the-clock work would  
 9 fly in the face of FLSA regulation 29 C.F.R. § 785.13, which requires "every effort" be made to  
 10 enforce such policies. Unfortunately, the Texas district court did not consider the application of 29  
 11 C.F.R. § 785.13 in its opinion. In summary, given the new arguments and evidence presented here  
 12 that were not ruled upon by the Texas district court, the decertification decision in *Johnson* does  
 13 not offer much guidance in deciding the motion now before this Court.

14 **VI. DEFENDANT'S "HAPPY CAMPER" DECLARATIONS ARE OF LITTLE**  
 15 **PROBATIVE VALUE BECAUSE PLAINTIFFS' CHALLENGE THE COMPANY'S**  
 16 **POLICIES, AND BECAUSE COURTS HAVE BEEN CHARY OF RELYING UPON**  
 17 **EMPLOYEE DECLARATIONS SOLICITED BY THE EMPLOYER**

18 **A. It Is Well-Settled That "Happy Camper" Declarations Are Of Little Probative**  
 19 **Value In Determining The Propriety of Class Certification**

20 <sup>20</sup> See, e.g., *Kurihara v. BestBuy Co.*, No. C 06-01184 MHP, 2007 WL 2501698, at \*10 (N.D. Cal.  
 21 Aug. 30, 2007) (granting class certification in FLSA action for unpaid wages and holding "Furthermore,  
 22 defendant's assertions regarding the failure of its employees to properly implement the company's standard  
 23 policies do not convince the court that substantial variations exist. Where a plaintiff challenges a well-  
 24 established company policy, a defendant cannot cite poor management to defend against class  
 25 certification."); *Alba v. Papa John's USA, Inc.*, No. CV 05-7487 GAF (CTx) 2007 WL 953849, at \*1 (C.D.  
 26 Cal. Feb. 7, 2007) (granting class certification of misclassification, meal and rest period and overtime  
 27 claims, and stating "Defendants also initially ignored, and now attempt to downplay, the impact of their  
 28 written, company-wide policy effectively stripping the store managers of discretionary authority in the  
 performance of their duties. Defendants' policies place the case within the scope of the court's analysis in  
*Tierno v. Rite Aid Corp.*, No. C 05-02520 THE, 2006 WL 2535056 (N.D. Cal. Aug. 31, 2006), where  
 common questions of law and fact were found to predominate in large part because of the presence of  
 standardized practices enforced from a central authority . . ."); see also *Staton v. Boeing Co.*, 327 F.3d 939,  
 956 (9th Cir. 2003) (affirming propriety of class certification in Title VII pattern and practice case, and  
 holding, "Boeing is responsible for the employment practices of all its units. Class counsel introduced  
 evidence of centralized decisionmaking. The unsurprising fact that some employment decisions are made  
 locally does not allow a company to evade responsibility for its policies.").

Courts have consistently held that the existence of potential class members who do not support the plaintiffs' claims does not defeat class certification. *See, e.g., Bremiller v. Cleveland Psychiatric Inst.*, 898 F. Supp. 572, 577 (N.D. Ohio 1995) (that some "potential class members may not want to come forward or are satisfied with the status quo. . . . does not defeat class certification."); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 664 (D. Minn. 1991) ("The Court observes further that differing levels of interest among prospective class members will not, alone, defeat the requirements of Rule 23(a).") (citing *Hedge v. Lyng*, 689 F.Supp. 884, 890 (D.Minn.1987)). Given the number of Auditors that RGIS has employed (more than 20,000 nationally), that some of them "may be personally satisfied with the existing system and may prefer to leave the violation of their rights unremedied" is not surprising. *Wilder v. Bernstein*, 499 F. Supp. 980, 993 (S.D.N.Y. 1980).

Defendant's employee declarations also have little probative value because they do not address the RGIS written policies upon which Plaintiffs' claims are based. Courts have disregarded "happy camper" declarations where the underlying claims were based on challenges to the impact of written policies and procedures on compensation. As Judge Patel held in *Kurihara*:

Defendant's efforts to undercut BestBuy's inspection policy by peeking at the merits are unpersuasive. First, Defendant's "litigation driven" selective sampling of employees and other data are insufficient to inject fatal uncertainty into the question of liability. Reviewing the employee declarations, there are striking similarities in the way they are worded. Indeed, the assertions are practically boilerplate. The court does not doubt that substantial legal and factual issues exist as to the nature and implementation of BestBuy's inspection policies and practices. The overarching question of whether this policy results in unlawful undercompensation, however, is common and predominant."

2007 WL 2501698, at \* 10 (emphasis added) (citation omitted).

Finally, as with the declarations in *Kurihara*, the Declarations submitted by RGIS are suspect because they contain a large amount of boilerplate language. Sunshine Reply Decl. ¶¶6-7, 9, 11, 12 (analyzing language of declarations). Thus, it is unsurprising that in numerous instances the employee declarants who were deposed or contacted by Plaintiffs' counsel stated that (a) the declarations did not accurately reflect their experiences at RGIS or their views about this case,

1 and/or (b) that they would not have submitted a declaration on behalf of the Company if they had  
2 known the facts regarding Plaintiffs' claims in this case. Park Reply Decl. ¶38.

3 **B. Courts Have Disregarded "Happy Camper" Declarations Because Of The Potential**  
4 **For Coercion In The Employer-Employee Relationship**

5 Two-thirds of the declarations submitted by Defendant were from current employees.  
6 Sunshine Reply Decl. ¶5. Courts have long recognized that employer-solicited declarations are of  
7 little probative value because of the nature of the employer-employee relationship. *See, e.g.,*  
8 *Morden v. T-Mobile USA, Inc.*, No. C05-2112RSM, 2006 WL 2620320, at \*3 (W.D. Wash. Sept.  
9 12, 2006) ("Defendant also argues that certain exemption defenses may apply that will require the  
10 court to make individual assessments of all the plaintiffs. In support of its arguments, defendant  
11 relies in part on 99 declarations from current employees, all of whom are potential collective action  
12 members. However, the Court will discount those declarations because of the risk of bias and  
13 coercion inherent in that testimony."); *Jenson*, 139 F.R.D. at 664 ("It is, of course, unlikely that  
14 potential class members would be unanimously supportive when most potential class members  
15 have an interest in maintaining amicable relationships at work."). As the court in *Shores v. Publix*  
16 *Super Markets, Inc.* recognized, "there is no marketplace of ideas in the workplace." *Shores*, No.  
17 95-1162-CIV-T-25(E), 1996 WL 859985, at \*1 (M.D. Fla. Nov. 25, 1996). Ideas are not  
18 exchanged, but rather relayed from supervisor to subordinate. *See Bublitz v. E.I. DuPont de*  
19 *Nemours and Co.*, 196 F.R.D. 545, 547 (S.D. Iowa 2000) ("the at-will employer-employee  
20 relationship between Defendants and the putative class members produces a strong potential for  
21 coercion."). Because of this imbalance of influence and the risk of coercion, courts have been  
22 leery of employee declarations gathered at the workplace. *Shores*, 1996 WL 859985, at \*4 (court  
23 was "highly suspicious" of class member declarations taken by employer via *ex parte*  
24 communication that occurred in workplace).

25 **C. Most Of Defendant's Declarants Were Paid For Their Time Spent In Connection**  
26 **With Their Declarations**

27 The Court need not look for insinuated promises of promotion or timely raises for evidence  
28 of coercion. This Court need look no further than Defendant's own statements in its opposition to

Plaintiffs’ recent motion to compel, in which Defendant’s counsel admitted that employees who submitted declarations were paid for their efforts because they were doing so “for the company’s benefit.” *See October 4, 2007 Joint Letter Brief re: Motion to Compel*, p. 16, attached as Exhibit K to the Park Reply Declaration.

## VII. PLAINTIFFS' PROPOSED FORM OF NOTICE IS SUFFICIENT

Defendant makes various objections to the content of Plaintiffs' proposed notice. Plaintiffs continue to believe that their proposed notice is adequate and fair for the reasons stated in their opening papers. However, Plaintiffs do agree with Defendant's proposal that the parties meet and confer regarding the substance of the notice to narrow their differences on this issue.

## VIII. CONCLUSION

For the reasons stated in their papers, Plaintiffs respectfully request that this Court grant their motion for conditional certification.

Respectfully submitted,

Dated: November 6, 2007

SCHNEIDER &amp; WALLACE

By: /s/  
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Counsel for Plaintiffs